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No. 08-1346

FILED
JUN 30 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

DAVID ACOSTA,

Petitioner,

v.

MARIE D. CAMPBELL, GREGG DREILINGER, LAW OFFICES OF DAVID J. STERN, P.A., CITIMORTGAGE, INC., CITIBANK, FSB, MORTGAGE CAPITAL ASSOCIATES, INC., RESIDENTIAL FUNDING CORPORATION, JAY M. STEREN, IMELDA W. LAY, and JOHN DOES 1-20,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS CAMPBELL, DREILINGER AND LAW OFFICES OF DAVID STERN, P.A.

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STATEMENT OF FACTS

The following facts were omitted or misstated in the petition.

The law firm prepared the papers to commence the state court foreclosure action at its office in Broward County, in South Florida. The law firm then mailed those papers on July 11, 2003 to the clerk of court in Seminole County, in Central Florida, for filing. The clerk received those documents for filing and filed them on July 16, 2003, the same day that the law firm received Acosta's verification request. The record is silent as to which of these events occurred earlier in the day.

The record is also silent as to whether the state court foreclosure action sought a potential deficiency judgment against Acosta, or merely sought return of the security.

REASONS FOR DENYING THE PETITION

The Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692, et seq. generally regulates the activities of debt collectors in the process of debt collecting. The two aspects involved here are disclosures that are required with some communications to the debtor, § 1692e and § 1692g; and communications to others of information about the debt, § 1692c(b).

Acosta's substantive claims are summarized in six numbered paragraphs on pages 24 through 29 of his Petition. The first claim takes issue with the Eleventh Circuit's decision in *Vega v. McKay*, 351 F.3d 1334 (11th Cir. 2003), that a complaint filed in court is not an "initial communication" that must contain certain disclosures

under § 1692g. The second claim complains that providing payoff estoppel information to a junior lienholder's attorney is a prohibited communication. The third claim harkens back to the first, arguing that subsequent documents filed in litigation after the initial complaint require certain disclosures under § 1692e. In the fourth and fifth claims, Acosta requests this Court to address Florida state law regarding owning and holding notes and mortgages, and Florida's parallel debt collection statute, the Florida Consumer Collection Practices Act, § 559.55, Fla. Stat., et seq. Asking this Court to address matters of state law is inappropriate, and will not be further addressed here. The sixth claim again harkens back to the first and relies upon Acosta's disagreement with the *Vega* decision that a complaint is not an "initial communication."

The issue regarding the Eleventh Circuit's decision in *Vega* has been settled by Congress. In the Financial Services Regulatory Relief Act of 2006, Public Law 109-351, § 802(a) added § 1692g(d) which provides that a "communication in the form of a formal pleading in a civil action shall not be treated as an initial communication . . . ." In effect, Congress adopted *Vega*. This defeats Acosta's first, third and sixth claims and resolves the circuit split that he mentions. Petition at pp. 16-20. If there was once a need for the Court to address this issue, there is no more.[1]

1. As a factual matter, the record does not support Acosta's contention made in the lower courts, see 2006 WL 3804729 *3, that the state court foreclosure suit was filed by the law firm after it received Acosta's verification letter. Acosta asserted that this violated § 1692g(b). Acosta has abandoned his position regarding the timing by not mentioning it in his Petition.

Acosta's second claim is to no avail for several reasons, including reasons that were not addressed by or were even rejected by the Eleventh Circuit. Communication between senior and junior lienholders in a mortgage foreclosure cannot be a violation of the FDCPA. First, as the district court pointed out, 2006 WL 3804729 *4, 5, virtually every court to consider the issue has concluded that foreclosing on a mortgage does not come within the definition of debt collection activity under the FDCPA unless a personal judgment is also sought. As the district court further noted, the record in this case is silent as to whether the state court foreclosure also sought personal judgment against Acosta. *Id.* at *5. Therefore, this case does not present a good opportunity to address this issue. This point is sufficient not only to rebut Acosta's third argument, but all his other FDCPA arguments as well.

The argument rejected by the Eleventh Circuit, 2009 WL 190089 **5 fn.***, also defeats Acosta's second claim. A senior lienholder providing payoff estoppel information is "reasonably necessary to effectuate a post judgment judicial remedy" within the meaning of the list of permitted communications under § 1962c(b). The Eleventh Circuit incorrectly rejected this argument, because the communication itself was prejudgment. However, the exemption language of the FDCPA only requires that the remedy be post judgment, not that the communication also be post judgment.

Of course, the rationale expressly adopted by the Eleventh Circuit applying its decision in *Vega* is also correct, and even more so now in light of Congress' codification of *Vega*. Because a pleading cannot be an

"initial communication" under § 1692g, communications among parties in a foreclosure action cannot be "communication" under § 1692c(b). These various bases to support the Eleventh Circuit's result demonstrate that the law regarding permissible communication among lienholders in a foreclosure does not require intervention by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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